

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
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RE: ***Jeannie Kennedy, et al. v. Invacare Corporation, et al.***
C.A. No. 04C-06-028 RFS

Submitted: August 4, 2005
Decided: September 15, 2005

Dear Counsel:

This is my decision on Defendant, Invacare Inc.'s Motion for Summary Judgment.

For the following reasons, Defendant's Motion for Summary Judgment is denied.

STATEMENT OF THE CASE

On September 9, 2002, Jeannie and James Kennedy ("The Kennedys") were renting a motor operated bed manufactured by Invacare Inc. ("Invacare"). The bed was installed and maintained by Neighborcare Inc. and Neighborcare Services Corporation (collectively "Neighborcare"). Jeannie Kennedy used the bed during her recuperation from knee replacement surgery. Mrs. Kennedy injured her right knee while using the bed on September 9, 2002. The Kennedys filed suit against both Invacare and Neighborcare on theories of negligence, *res ipsa loquitur*, and strict product liability. Essentially, the

Kennedys allege that the Defendants failed to provide a reasonably safe bed, failed to warn of a dangerous condition, and failed to properly inspect the bed.

Plaintiffs have submitted a single expert's report in support of their claim that Invacare acted negligently. Plaintiffs' expert, Robert B. Benowitz, states that the bed malfunctioned in a manner that, "should not occur absent a problem with the design or manufacture of the bed by Invacare or improper maintenance, set up or handling by NeighborCare." At this stage of the action, Mr. Benowitz is the sole expert for the Plaintiffs on the causation issue.

Invacare has filed this Motion for Summary Judgment arguing that it is entitled to a decision in its favor as a matter of law under Superior Court Rule 56. Invacare argues that this Court should exclude Plaintiffs' expert report, under Delaware Rule of Evidence 702, because it is "too speculative." Defendant asserts that an expert must prioritize the causes of the mishap. If Mr. Benowitz's report is excluded, there is no expert testimony which is required to support this negligence action. Neighborcare joined in with Invacare's motion.

DISCUSSION

A. Standard of Review

Summary judgment cannot be granted where material issues of fact exist; only a jury can resolve them. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979). The moving party must establish the lack of material factual issues. *Id.* Should the moving party establish the absence of material factual issues, the nonmoving party must prove the presence of such issues in order to prevent summary judgment. *Id.* at 681. In consideration of a motion for summary judgment, the evidence is viewed in a light most

favorable to the nonmoving party. *Id.* at 680. Where the moving party has produced sufficient evidence under Rule 56, the non-moving party may not rely solely upon her pleadings. *Id.* Evidence must be produced showing a material issue of fact. *Steffen v. Colt Industries*, 1987 WL 8689, *3 (Del. Super. Ct.) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986)). Summary judgment is not appropriate if the Court determines that it does not have sufficient facts to enable it to apply the law. *Reese v. Wheeler*, 2003 WL 22787629, * 2 (Del. Super. Ct.) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962)).

B. Invacare's Motion for Summary Judgment

Invacare argues that this Court should grant summary judgment in its favor as Plaintiffs' expert report offers only five explanations of why the injury occurred, rather than one probable cause of the injury. Invacare cites Delaware and Federal cases to argue for the exclusion of expert testimony that is "speculative," or offers merely a "possibility of causal connection" to the harm.¹ From this position, Invacare asserts that summary judgment is appropriate since no other expert testimony is available.

¹ See, e.g., *Price v. Blood Bank of Del.*, 790 A.2d 1203, 1210 (Del. 2002) ("To be reliable, testimony 'must be based on the methods and procedures of science, rather than subjective belief or speculation.'") (citing *In re TMI Litig.*, 193 F.3d 613, 669 (3d Cir. 1999) emphasis added); *Joseph v. Jamesway Corp.*, 1997 WL 524126 (Del. Super. Ct. 1997) (' In short, viewing the evidence in a light most favorable to him, all Joseph has shown is that the bicycle broke but no other Roadmaster bicycles broke. This is no more than conjecture or, at most, a possibility. That is insufficient even to survive a motion for summary judgment."); *Phillips v. Delaware Power & Light Co.*, 216 A.2d 281, 284-285 (Del. 1966) ("Citation of authority is unnecessary for the proposition that a plaintiff may not recover when he shows nothing more than mere possibility of causal connection between the alleged wrong doing and injury...")

Delaware Rule of Evidence 702 governs the admissibility of expert testimony.²

"Since Delaware Rule of Evidence 702 is identical to its federal counterpart; Delaware Courts rely on the United States Supreme Court's most authoritative interpretation of the Federal Rule of Evidence 702." *M.G. Bancorporation, Inc. v. LeBeau*, Del. Supr., No. 12414, slip op. at 12-16, Holland, J. (April 30, 1999), *quoted in Pfizer Inc. v. Advanced Monobloc Corp.*, 1999 WL 743927, *2 (Del. Super. Ct.). The United States Supreme Court's paradigm case regarding Rule 702 is *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In *Daubert*, the Court held that trial courts should function as "gatekeepers" to "ensure that any and all testimony is not only relevant, but reliable." *Daubert*, 509 U.S. at 589. The "touchstone" of the *Daubert* gatekeeping function is to establish whether the expert testimony is helpful to the trier of fact, and based upon sufficiently reliable methods that will "aid the jury in reaching accurate results." *In re Paioli Railroad Yard PCB Litigation*, 35 F.3d 717, 744-45 (3d Cir.1994). Invacare's argument suggests that Plaintiff's expert has offered evidence that is too speculative to be reliable because a principal cause of the injury was not established. Therefore, Invacare maintains that his conclusions are "too speculative, since, with respect to Invacare, he offers only the possibility that either a design defect or manufacturing defect, out of five possible causes, caused Mrs. Kennedy's injuries." Def. Mot. Summ. J., at 2.

² Delaware Rule of Evidence 702 states that " if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified to as an expert by knowledge, skill, experience, training, or education, may testify to thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

According to Invacare, *Phillips v. Delaware Power & Light Co.* 216 A.2d 281 (Del. 1966) is the controlling authority requiring the exclusion of Plaintiff's expert testimony. In 1966, the Delaware Supreme Court held in *Phillips* that a plaintiff could not recover where the expert testified that it was just as likely that defendant actions caused an injury, as it was that it was caused without such negligence. *Phillips v. Delaware Power & Light Co.*, 216 A.2d at 284 (Del. 1966). Obviously, equivocal testimony is not reliable enough to support a verdict. Delaware Courts recognize this point today in the context of a Rule 702 analysis. For this purpose, the question is whether the testimony is based on sufficient facts, reliable methods and principles, as opposed to "subjective belief or speculation." *Price v. Blood Bank of Del.*, 790 A.2d 1203, 1210 (Del. 2002).

With these considerations in mind, Plaintiff's expert report is sufficient under Delaware Rule of Evidence 702. In preparing his preliminary report, Mr. Benowitz reviewed the following factual materials: the medical report of Andrew P. Robinson, M.D.; Neighborcare rental documentation; and photographs of the Invacare bed.³ In concluding this report, Mr. Benowitz based his conclusion "within a reasonable degree of engineering certainty." Pl. Expert Report at 2.

From this perspective, Mr. Benowitz's report was not "subjective belief or speculation." *Price*, 790 A.2d at 1210. Here, Mr. Benowitz reviewed the available factual

³ Pl.'s expert report states that, "as she (Mrs. Kennedy) was getting out of bed it suddenly malfunctioned so that the bed platform dropped by nearly a foot. The sudden motion of the bed as she was exiting caused her to injure her right knee according to a medical report, requiring additional medical treatment, surgery and hospitalization. Mrs. Kennedy's husband noted that he observed that a pulley holding one of the cables under the bed apparently rotated or became mal-positioned and let a taut cable slip allowing the bed to drop towards the floor."

materials concerning the bed and incident in question. Pl. Expert Report at 1. Mr. Benowitz offers the conclusion that the incident is of the kind that should not occur "absent a problem with the design or manufacture of the bed by Invacare or improper maintenance, set-up, or handling by Neighborcare." *Id.*

While Mr. Benowitz has offered five causes of Mrs. Kennedy's injuries, this variety does not invalidate his opinion. Unlike *Phillips*, the expert in this case has stated conclusively that he believes this incident to be the kind that should not have occurred absent negligence by either Invacare or Neighborcare. He states that within a "reasonable degree of engineering certainty" that negligence caused the injuries of Mrs. Kennedy. *Id.* at 2. In *Phillips*, the expert could not conclude whether it was more likely that a gas main rupture causing an explosion was occasioned because of frost or negligent repairs. *Phillips*, 216 A.2d at 284. The expert testimony at issue in *Phillips* is distinguishable from the opinion offered here. The testimony in that case only supported the notion that it was just as likely that defendant's negligence caused the gas pipe to burst, as it was that cold weather did. *Id.*

Furthermore, Delaware Courts have allowed plaintiffs to present to the jury "alternative causes that could be grounds for defendant's liability." *Jones v. Tsoukalas*, 1990 WL 105002, *4 (Del. Super. Ct.). In *Jones*, the court distinguished *Phillips* in denying summary judgment where the plaintiff testified that either "slipperiness or an uneven board" caused her to trip in defendant's restaurant. *Id.* at * 1. As in this case, *Jones* was faced with a plaintiff that could offer evidence supporting one or more causes leading to plaintiff's injury. *Id.* at *4. Presenting such alternative grounds for liability "removes causation from the realm of speculation and conjecture." *Id.* An injury may

have multiple causes,⁴ and such causes can be asserted in the alternative. *Pierce v. Indian Landing Creek Properties*, 1991 WL 113580,* 3 (Del. Super. Ct.) (citing *Jones*, 1990 WL 105002, at *4).

In conclusion, Plaintiff's expert has presented material factual issues through evidence of causation that is not unreliable. Plaintiff's expert has opined that this incident, based upon principles of engineering and safety, should not occur absent a design or manufacturing defect by Invacare or improper maintenance by Neighborcare. While these claims are denied, a jury question is presented which does not allow summary judgment.

CONCLUSION

Considering the foregoing, summary judgment cannot be granted.

IT IS SO ORDERED.

Richard F. Stokes, Judge

Original to Prothonotary

⁴ *Hedrick v. Webb*, 2004 WL 2735517, *4 (Del. Super. Ct.); *Pierce v. Indian Landing Creek Properties*, 1991 WL 113580, * 3 (Del. Super. Ct.) (citing *Sweetman v. Strescon Industries, Inc.*, 389 A.2d 1319, 1323 (Del. Super. Ct. 1978)).